United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1040

To be argued by
EUGENE NEAL KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1040

UNITED STATES OF AMERICA,
Appellee,

—v.—

WILLIAM FIGUEROA and HERBERT RICKS,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

William Figueroa and Herbert Ricks appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on January 15, 1976, after a three-day trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 75 Cr. 975, filed October 10, 1975, charged in Count One that from on or about May 1, 1975, Figueroa, Ricks and Jewelean Durr * had conspired to

* On November 19, 1975, Jewelean Durr pled guilty to the first count of this Indictment. Subsequently, she testified on behalf of the Government at the trial of Figueroa and Ricks. On January 8, 1976, Mrs. Durr was sentenced by Judge Carter to one year of incarceration, with execution of this jail sentence suspended, and she was placed on probation for eighteen months.

distribute, and to possess with intent to distribute, narcotic drug controlled substances in violation of Title 21, United States Code, Section 846. In Count Two, Figueroa, Ricks and Durr were charged with having possessed with intent to distribute approximately 232.02 grams of cocaine on September 22, 1975, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A). Ricks alone was charged in Count Three with having possessed with intent to distribute approximately 27.83 grams of cocaine on the same day, September 22, 1975, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced against both Figueroa and Ricks on November 24, 1975 and concluded on November 26, 1975 when the jury found both defendants guilty on all counts in which they were charged.

On January 15, 1976, Judge Carter sentenced both Figueroa and Ricks to concurrent terms of three years imprisonment, to be followed by a three year special parole term, on each of the counts on which they were convicted.

Both Figueroa and Ricks are presently serving their sentences.*

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* Both defendants moved in the district court for enlargement on bail pending appeal, and these motions were denied by Judge Carter. Subsequently, both Figueroa and Ricks appealed from this denial of bail, and their appeals were rejected by this Court, without opinion, on February 3, 1976.

Statement of Facts

The Government's Case

The Government's proof at trial established that on June 5, 1975 and September 22, 1975, defendants Ricks and Figueroa, with the assistance of defendant Durr, participated in large sales of cocaine.

A. The June 5, 1975 transaction.

During the first week of June, 1975, Jewelean Durr had a conversation with Harry Robinson during which Robinson proposed to introduce Durr to an individual named John Miller so that Durr could sell Miller a quantity of cocaine (Tr. 154).* That evening, Durr returned to her home at 717 Rockaway Parkway, Brooklyn, New York, where she lived with Herbert Ricks. She told Ricks about the proposed sale of cocaine (Tr. 154). Ricks then gave Durr a small sample of cocaine and instructed her to deliver it to Miller (Tr. 154).

On June 5, 1975 (GX 1; Tr. 38), Durr met with John Miller and Miller's girlfriend, Diane, in Harry Robinson's office (Tr. 39, 149). There, Durr gave Miller the sample of cocaine which she had received from Ricks. Miller and his girlfriend then sampled the cocaine (Tr. 39-40, 150, 155). Apparently satisfied with the quality of the cocaine, Miller asked Durr the price of the drug, how many times it could be cut, and whether she could set up a deal for him to purchase a larger quantity (Tr. 41, 155). Durr then phoned Ricks who told her to call him back in an hour (Tr. 41, 155). In the meantime, Durr, Miller, Diane and Robinson left

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* Page references with the prefix "Tr." refer to the trial transcript. "A." refers to the Appellant's Appendix. "GX" refers to the Government Exhibits.

the office and walked to Central Park, where they smoked a marijuana cigarette (Tr. 43, 156).

All four individuals then walked to a nearby bar where Durr again called Ricks. During Durr's conversation with Ricks, she put Miller on the phone and he then discussed the price and quantity of cocaine available for sale. Miller expressed a desire to purchase eight ounces of cocaine for $10,000 (Tr. 43-44, 156). Durr returned to the phone and Ricks ended this call by telling her that he had "to check things out and [that she should] call him later" (Tr. 157). Durr then provided Miller with her telephone number at work and told him to call her there in about an hour (Tr. 44, 158). Durr and Robinson left the bar (Tr. 45).

About one hour later, Miller called Durr (Tr. 45). During the call, Miller negotiated further for the sale of cocaine. After checking with Ricks, Durr gave Miller her home telephone number, telling Miller that he could reach either Ricks or herself at that number later the same day (Tr. 45-46, 158-59).

Miller spoke with Ricks by phone later that afternoon and finalized arrangements for the purchase of eight ounces of cocaine for $10,000 (Tr. 46). The sale was to occur at 8 o'clock that evening at Room 145 of the Sawmill River Motel in Elmsford, New York (Tr. 46-48, 160; GX 1).*

After the call from Miller, Ricks left Durr at their home and went to discuss this planned sale of cocaine with William Figueroa (Tr. 161). Ricks then returned home, and he and Durr left for the motel (Tr. 48, 163-165).

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* Ricks wrote this information down with a pencil and paper provided him by Durr (Tr. 160) and Durr later transcribed this into her personal telephone book (GX 6; Tr. 162).

Once at the motel, Miller showed Ricks $5,000 of the purchase money which he had for the cocaine (Tr. 51-52, 166), whereupon Ricks told Miller that he did not yet have the eight ounces of cocaine, but that he would procure it and return to the motel either later that evening or the next day (Tr. 53-54). Before leaving the motel, however, Ricks gave Miller a small amount of cocaine for which Miller paid Ricks $100 (Tr. 53, 166).

Ricks and Durr then drove to Figueroa's home in Brooklyn (Tr. 166). There, Ricks and Figueroa had a conversation (Tr. 166), after which Ricks phoned Miller (Tr. 55, 167). After this phone call was concluded, Ricks, Figueroa and Durr drove to the motel in Elmsford (Tr. 167-68). They were followed throughout this trip by a second car containing Figueroa's brother (Tr. 167).

Upon their arrival at the motel, Durr and Ricks returned to Miller's room (Tr. 56, 168). Figueroa, in turn, entered his brother's car (Tr. 168). In the room, Ricks handed Miller eight ounces of cocaine and Miller paid Ricks the remaining $9,900 (Tr. 56, 168).* Miller and Ricks then agreed that Ricks would return the following day to help "cut" the cocaine (Tr. 57). Ricks then left the motel room, while Durr remained behind for a few minutes (Tr. 169). As Durr departed from the room, she observed Ricks getting out of the car containing Figueroa (Tr. 169-70). She and Ricks then returned to Brooklyn (Tr. 170), and during the journey, Ricks gave her $400 and stated that he had only made $800 on the deal "because of the fact that he owed Willie [Figueroa] money fo. some cocaine" (Tr. 170).

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* Durr testified that she left the motel room at one point to get a scale from Figueroa (Tr. 168-69). Miller did not recall this.

The next day, June 6th, Ricks returned to Miller's motel room at about 3 P.M. and "cut" the eight ounces of cocaine twice with lactose, producing a total of twenty-four ounces (Tr. 58-59, 172). Miller gave Ricks $50 for providing this service, and Ricks left the room. Miller then went to La Guardia Airport where he departed by airplane for Chicago (Tr. 59).

In Chicago, on June 9, 1975, agents of the Drug Enforcement Administration arrested Miller in possession of the twenty-four ounces of cocaine which he had gotten from Ricks (Tr. 60). It was at this point that Miller agreed to become a government informant (Tr. 60).

B. The September 22, 1975 transaction.

During the next several months, between June and September, Miller had several telephone conversations with Durr and Ricks (Tr. 60-61, 173).* In one of these conversations, Miller and Ricks discussed the sale of one kilogram of cocaine, for which Ricks quoted Miller a price of $36,000 (Tr. 61).

On the evening of September 18, 1975, Miller called Durr at her home (GX 2; Tr. 62-63, 178). During this tape recorded call, Miller told Durr that he would be in New York City on Monday and he asked Durr if she could obtain a pound of cocaine for him, to which she replied that she would "have to speak to [her] people" (GX 2). They discussed the price and quality of the cocaine (GX 2), and it was agreed that Miller would

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* It was Durr's testimony that during the summer of 1975, Figueroa delivered cocaine to her which she paid for and then gave to Ricks. Durr also testified that similar transactions had occurred during 1974 (Tr. 174-78).

call back at 2:00 P.M. the following day and discuss the matter further with Ricks (GX 2).

On the next day, September 19, 1975, Miller called Durr's house and spoke with both her and Ricks (GX 3; Tr. 65-66, 178-79). During this recorded telephone conversation, Ricks told Miller "we can go the same distance that we went before [eight ounces of cocaine] and that's guaranteed, but . . . I'll take twenty thousand [dollars] and work within that area" (GX 3). Miller asked if $20,000 were the price for a pound of cocaine and Ricks responded affirmatively (GX 3). Ricks also stated that he was working for someone else and that, therefore, he needed some time to put the deal together (GX 3). At one point during their conversation, Miller inquired of Ricks, "How good's the coke, man?" and Ricks responded by saying ". . . we can't talk about that on no phone" (GX 3). However, Ricks did indicate that the cocaine would be at least as good as that supplied to Miller in June (GX 3). It was agreed that Ricks and Miller would meet on Monday, September 22, 1975, in order to proceed further with the transaction (GX 3). After this conversation had ended, Ricks told Durr that "he had to see about getting the cocaine for [Miller]" (Tr. 179).

On Sunday night, September 21, 1975, Miller arrived in New York City and on Monday morning, September 22, 1975, he met with several Drug Enforcement Administration agents (Tr. 68-69). Following his initial debriefing, Miller made another recorded telephone call to Durr's home and spoke with both her and Ricks (GX 4; Tr. 69-70, 179-180). During this call, Miller and Ricks arranged to meet at Martell's bar on 83rd Street and Third Avenue in Manhattan that afternoon (GX 4). Miller told Ricks that his "old lady" was holding the money for this purchase, to which Ricks replied that "its always business with me" (GX 4).

As scheduled, Ricks and Durr met Miller at the bar (Tr. 72, 182). Ricks informed Miller that there was a good chance of his getting a pound of cocaine for him for $20,000 (Tr. 74-75) and that the deal could be arranged for that same night (Tr. 75). In addition, Ricks told Miller "that he'd have to see his man or find his man to make sure he can get the quality and quantity [Miller was] looking for" (Tr. 75). This meeting concluded with Ricks telling Miller to telephone him later that afternoon (Tr. 75, 183).

Ricks and Durr then returned to their home in Brooklyn (Tr. 183-84). During the trip, Ricks told Durr that he was going to meet with Figueroa to see if he was ready with the cocaine (Tr. 184). When they arrived home, Ricks made a telephone call and then left, telling Durr that he was going to "see Willie about the cocaine" (Tr. 184-85). Ricks was then observed by Drug Enforcement Administration agents meeting with someone at Schenck Street and Stanley Avenue in Brooklyn (Tr. 268-70), following which he returned home (Tr. 270) and told Durr that they would meet with Figueroa at 9 o'clock that evening (Tr. 185).

That evening, Miller again called Ricks (Tr. 76, 185-86, GX 5). During this tape recorded conversation, it was agreed that Ricks would bring the cocaine to Room 246 of the Skyline Motor Inn in Manhattan between 9:30 and 10 P.M. that night (GX 5). Following this call, Ricks informed Durr that they were meeting Miller at 10 P.M. and that she should be ready to go into Manhattan at 9 P.M. (Tr. 187). Ricks then made a telephone call, after which he left their apartment (Tr. 187).

Ricks was then observed by Drug Enforcement Administration agents driving to the McDonald's hamburger restaurant on Pennsylvania Avenue in Brooklyn, where he met with Figueroa (Tr. 271-72). When he returned

home a short time later, Ricks confirmed to Durr that he had gone to see Figueroa (Tr. 187).

At about 9 P.M. that evening, Ricks and Durr departed 717 Rockaway Parkway and, by a circuitous route (Tr. 188, 272-73), drove to the vicinity of Figueroa's mother's house in Brooklyn (Tr. 188, 342). Once there, Ricks got out of the car, leaving Durr alone for several minutes until one of Figueroa's brothers * came along and told her to come with him to his family's house, which she then did (Tr. 188-89). Inside the house, Durr observed Figueroa hand Ricks two plastic bags containing cocaine (Tr. 189). Ricks, Figueroa and Durr then proceeded to their respective automobiles (*Id.*). Upon entering their car, Ricks handed Durr the two plastic bags which he had gotten from Figueroa and told Durr to put them inside of her handbag (*Id.*).

While enroute to Manhattan, Ricks told Durr to take the two bags of cocaine out of her pocketbook, gave her a bag of lactose and a spoon, and instructed her to remove two spoons of cocaine out of each bag and replace them with two spoonfuls of lactose (Tr. 190). Durr did as she was told and then placed the two bags which had been received from Figueroa back into her handbag and the remaining spoonfuls of cocaine into a pouch (GX 9). Durr testified that this cutting process had been engaged in because Ricks "had to see someone else later . . . [a]nd give him the cocaine" (Tr. 191).

Once their respective vehicles had entered Manhattan, the group proceeded to 49th Street between Tenth and Eleventh Avenues, where they parked (Tr. 192, 273-74). Figueroa remained in his car (the same vehicle as had earlier been observed at McDonald's) (Tr. 271,

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* Figueroa testified that he had eleven brothers (Tr. 331-32).

274), while Ricks and Durr, after first placing the pouch containing the four spoons of cocaine (GX 9) under the armrest (Tr. 192-93), got out of their car and entered the Skyline Motor Inn (Tr. 193).

Ricks and Durr then entered Room 246 of the Skyline Motor Inn, whereupon Miller introduced them to Heather Campbell, a Drug Enforcement Administration undercover agent (Tr. 81-82, 193, 298-99, GX 11). Ricks removed the eight ounces of cocaine from Durr's purse and placed the two bags (GX 12 and 15) on a dresser (Tr. 82, 193, 299, GX 11). Miller remarked that Ricks had only brought eight ounces, instead of the sixteen which he had asked for, and Ricks replied that he could get another eight ounces at about 12 or 1:00 A.M. that night (Tr. 82, 193, 299, GX 11). Agent Campbell then stated that she could not wait until then for this additional cocaine (Tr. 82, 299, GX 11) and asked Ricks if it were alright if Miller checked the packages, to which Ricks responded, "It's beautiful" (Tr. 193, 300, GX 11). Miller then ripped open one of the bags, tasted the contents, and indicated to Agent Campbell that it indeed contained cocaine (Tr. 82-83, 193).* At this point, Campbell gave a pre-arranged signal via the transmitter which she was wearing (Tr. 297-98) and other Drug Enforcement Administration agents, who had been stationed in an adjoining room, entered and placed Durr and Ricks under arrest (Tr. 81-83, 194, 250-51, 300; GX 11).** Thereafter, Figueroa was apprehended in his car outside of the motel (GX 10A, 11, Tr. 275).

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* According to the uncontroverted testimony of a Drug Enforcement Administration chemist, the substance contained in each of Government's Exhibits 9, 12, 14 and 15 was cocaine hydrochloride (Tr. 314-15).

** Following the arrest of Ricks and Durr, the pouch (GX 9) containing cocaine was found under the armrest of Ricks' Cadillac.

The Defense Case

William Figueroa testified on his own behalf. In testimony, which the trial judge later characterized as evasive, not worthy of belief and containing outright lies (Minutes of Bail Hearing of December 23, 1975 at p. 13), Figueroa denied ever having delivered any cocaine to Durr or receiving any money from her (Tr. 324); having been at the motel in Elmsford, New York in June 1975 (Tr. 325), or having given any package to Ricks on September 22, 1975 (Tr. 325), stating, instead, that on that night he had been working in his family's grocery store (Tr. 325).

On cross-examination, Figueroa denied that he had ever seen Durr prior to the trial (Tr. 328), and stated that, while he only knew Ricks casually from the neighborhood (Tr. 328, 344), he had called him on several occasions to speak with him about personal matters (Tr. 346).* He stated that he resided at 774 New Jersey Avenue at the time of his arrest (Tr. 341), notwithstanding the fact that he had told Assistant United States Attorney Block on September 23, 1975 that he resided at 25 Marginal Street (Tr. 354). He attempted to explain this away by stating that the latter address was the one to which the authorities could place a telephone call and advise of his arrest (Tr. 354), this notwithstanding the fact that there was no telephone at those premises (Tr. 347, 349).

Figueroa admitted that he had been to McDonald's on September 22, 1975 (Tr. 351), but denied having met with Ricks there (Tr. 351). Figueroa testified that he was going to Victor's Cafe on 71st Street and Columbus

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* Figueroa had Ricks' telephone number in his phone book (GX 16; Tr. 309-310).

Avenue on September 22, 1975 (Tr. 352-53, GX 10A), when he was arrested by the Drug Enforcement Administration agents on 49th Street between Tenth and Eleventh Avenues (GX 10A).* Numerous other matters bearing upon Figueroa's credibility were elicited on cross-examination (See, *e.g.*, Tr. 357-61, 364-66).

William Figueroa called no other witnesses.

Herbert Ricks called Special Agent Thomas Dolan of the Drug Enforcement Administration to inquire about certain payments which had been made to John Miller as an informant (Tr. 370). In addition, three of the Government's witnesses, Group Supervisor Michael Levine of the Drug Enforcement Administration, Durr and Miller, were recalled for further examination concerning the tape recordings in evidence (GX 2, 3, 4, 5 and 11) and the payment of certain monies by the Government to Durr and Miller (Tr. 372-84).

Herbert Ricks called no other witnesses.

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* The Government introduced Figueroa's statement made to Assistant United States Attorney Block on September 23, 1975 concerning Victor's Cafe (GX 10A) as a false exculpatory statement showing consciousness of guilt. See, *e.g.*, *United States* v. *Johnson*, 513 F.2d 819, 824 (2d Cir. 1975); *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

ARGUMENT

POINT I

Proof Of The June, 1975 Narcotics Transaction As An Overt Act In Furtherance Of The Conspiracy Charged Was Proper And Did Not Deprive The Defendants Of A Fair Trial Or Due Process Of Law.

Relying principally on *United States* v. *Baum*, 482 F.2d 1325 (2d Cir. 1973), and *United States* v. *Kelly*, 420 F.2d 26 (2d Cir. 1969), Figueroa and Ricks argue that the Government's proof of the June 5, 1975 cocaine transaction between Miller and the defendants (*supra* at 3-6) deprived them of a fair trial. This argument is meritless.

On October 10, 1975, the instant indictment was filed charging the defendants, in Count One, with conspiring to violate the narcotics laws from May 1, 1975 until the date of the filing of the indictment. The overt acts recited in this count (A. 8) related solely to events taking place on the date of defendants' arrest, September 22, 1975, notwithstanding the indictment's allegation that the conspiracy commenced in May, 1975.* On October

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* It is clearly settled that an indictment charging a violation of the narcotics conspiracy statute, 21 U.S.C. § 846, need not allege any specific overt act (or any overt acts at all) in furtherance of the conspiracy. It "is sufficient if it alleges a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated. . . ." *United States* v. *Bermudez*, 526 F.2d 89, 94 (2d Cir. 1975). Moreover, it is equally well settled that a "conspiracy conviction [under 18 U.S.C. § 371] may be sustained upon a showing of overt acts in furtherance of the conspiracy even if the overt acts are not alleged in the indictment." *United States* v. *Fassoulis*, 445 F.2d 13, 19 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); *United States* v. *Armone*, 363 F.2d 385, 400 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966); *United States* v. *Negro*, 164 F.2d 168 (2d Cir. 1947).

28, 1975, almost immediately after the indictment was filed, counsel for co-defendant Durr moved, *inter alia*, for a bill of particulars detailing "all overt acts upon which the government will rely at trial in an effort to prove the alleged conspiracy, whether listed in the indictment or not . . ." (Notice of Motion by Michelman & Michelman, Esqs., dated October 28, 1975 at p. 9).* The Government, thereafter, filed a response opposing this request. (Affidavit of Thomas M. Fortuin in Response to Durr's Motion at p. 3).**

The trial court did not rule upon the substance of this motion because, in the interim, the prosecution and defense counsel engaged in what has come to be known as "open-file" discovery.*** According to Ricks' counsel, on November 5, 1975, he "was permitted to take copious notes" of the government's file of this case (Br. of Ricks at 4). It is contended, however, that at that time the Government's file did not contain any reference to the June 5, 1975 transaction.

As trial counsel for the Government stated on the record (Tr. 8-9), he first became aware of the June 5, 1975 transaction when the Drug Enforcement Administration's case agent delivered his file to the Assistant United States Attorney seven days prior to trial, on November 17, 1975. This file contained a statement

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* It is not clear from the record whether or not Figueroa and Ricks formally joined in this motion (but see Tr. 7).

** Opposition to this broad request was well founded, in that, "[t]here is no general requirement that the government disclose in a bill of particulars all the overt acts it will prove in establishing a conspiracy charge. . . ." *United States* v. *Carroll*, 510 F.2d 507, 509 (2d Cir. 1975). See also *United States* v. *DeViteri*, 350 F. Supp. 550, 552-53 (E.D.N.Y. 1972).

*** On November 20, 1975, after Durr pled guilty, Judge Carter filed a memo-endorsement denying this motion as moot (A. 5).

by co-defendant Durr,* made on the night of her arrest, September 22, 1975, which read:

> "During the month of June, 1975, I met John Miller at a motel on Saw Mill River Parkway. I went to this motel with Herbie Ricks and witnessed a narcotics transaction involving eight ounces of cocaine for $10,000. Ricks gave Miller the eight ounces of cocaine and Miller gave Ricks $10,000. Later that evening Ricks gave me $400" (GX 3504; Tr. 210).**

Almost immediately, the Assistant United States Attorney disseminated notice of the existence of this information and of its potential use at trial to counsel for the defendants. On Tuesday, November 18, 1975, during a conference held in the United States Attorney's office for the purpose of exchanging certain other items of discovery, trial counsel for Figueroa was advised of the substance of Durr's statement concerning the June 5, 1975 transaction. On the next day, November 19, 1975, during Ricks' aborted attempt to plead guilty, the Assistant United States Attorney advised counsel for Ricks concerning this June transaction and Ricks' counsel acknowledged receipt of this information by stating on the record:

> "This morning for the first time I was made aware by Mr. Kaplan of a transaction that he

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* This statement was the subject of a motion to suppress. (Notice of Motion by Michelman & Michelman, Esqs., dated October 28, 1975, at p. 16).

** While it is indeed true that the Government in its broad sense, namely the Drug Enforcement Administration, had knowledge of the June, 1975 transaction from September 22, 1975 and may have imparted this knowledge to the Assistant United States Attorney formerly in charge of this case, the Assistant United States Attorney who tried this matter did not have knowledge of it until Durr's statement was delivered to him.

> would have intended to use against Mr. Ricks which took place in June of 1975 according to the allegations of the government" (Transcript of Proceedings in *United States* v. *Herbert Ricks*, 75 Cr. 975, on November 19, 1975 at p. 8).

Thereafter, later in the day of November 19, 1975, co-defendant Durr pled guilty to Count One of this indictment and commenced her cooperation with the Government. As the result of subsequent conversations both with Durr and the informant, John Miller, the Government was able to learn further specifics concerning the June 5, 1975 cocaine transaction and this prompted the writing of the November 21, 1975 letter, now marked as Court's Exhibit 1.* This letter was hand delivered to counsel for Ricks when he appeared at the office of the United States Attorney at 3:30 P.M. on the afternoon of November 21, 1975 to serve the Government with a copy of his motion to suppress evidence which was seized from Ricks' automobile and was similarly hand delivered, by messenger, on that afternoon both to trial counsel for Figueroa and the District Court.

Prior to the commencement of the trial, on Monday, November 24, 1975, five days after both counsel had received notice of the June 5, 1975 transaction, counsel for Ricks addressed certain objections to the Government's proof of this earlier cocaine transaction.** Cast-

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* The full text of this letter is reprinted at A. 49-50 and the applicable portion of it is set out at Tr. 10.

** Counsel for Figueroa made no motion with respect to the proof of this transaction. Counsel for Figueroa did, to be sure, make certain "remarks" concerning two tape recordings (GX 2 and 3) which were revealed to the defense for the first time on the morning of November 24, 1975 and which were subsequently utilized by the Government as part of its case in chief (GX 2

[Footnote continued on following page]

and 3). While Figueroa's present counsel refers to these as tapes of "July" telephone calls (Br. of Figueroa at 11, 14), these tapes concerned the conversations between Miller, Durr and Ricks on September 18 and 19, 1975, and came into the possession of the United States Attorney's office as the result of conversations with Miller, commencing on the Thursday prior to trial (Tr. 113), during which Miller revealed to the Assistant United States Attorney the existence of tape recordings between himself, Durr and Ricks, in addition to those recordings already in the possession of the Assistant United States Attorney and previously disclosed to the defense (GX 4 and 5). Miller indicated that these additional recordings were in the possession of the Drug Enforcement Administration office in Chicago, Illinois. As stated on the trial record (Tr. 4), the Chicago office confirmed the existence of these additional tapes on Friday, November 21, 1975, and, at the instruction of the Assistant United States Attorney, immediately had them flown to Kennedy Airport in New York, where they were picked up by Drug Enforcement Administration agents and delivered to the United States Attorney's office. They were played by the Assistant United States Attorney for the first time on Saturday, November 22, 1975.

Fully aware of its obligation under *United States* v. *Crisona*, 416 F.2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970), the Government thereafter caused transcriptions of these tapes to be prepared prior to trial and, at the earliest possible moment prior to the start of trial, advised defense counsel of the existence of these tapes and of the fact that these tapes would be played for them at any time which they found to be convenient. Moreover, the Government clearly stated that it would not play these tapes for the jury until the close of its case (Tr. 5). The foregoing was in ample compliance with the Government's continuing obligation of disclosure under former Rule 16(g), Fed. R. Crim. P. (now Fed. R. Crim. P. 16(c)).

Neither defense counsel requested a continuance as a result of the revelation of these tapes, counsel for Figueroa merely questioning the propriety of the Government's late disclosure. Judge Carter found the Government's explanation with regard to these tapes to be satisfactory (Tr. 5, 6, 14-15) and amply protected the rights of the defendants in this regard by indicating that "either during the lunch hour or this evening [defense counsel are] going to have to listen to them [the tapes, GX 2 and 3] and if you want to make any motions I will have to listen to them" (Tr. 5), by stating that "[i]f the matter

[Footnote continued on following page]

ing reliance upon Durr's motion for a bill of particulars, and on his examination of the Government's file earlier in November, Ricks moved "that the indictment be dismissed for misconduct of the government" (Tr. 8) or, alternatively, "to preclude the substance of [the November 21, 1975] letter" (Court's Exhibit 1, A. 49-50), on the grounds of improper notice by the Government concerning the June, 1975 transaction (Tr. 7-8). The prosecutor responded by explaining how he had come to learn about the June, 1975 transaction and outlining the efforts he had made to promptly alert defense counsel to the underlying facts (Tr. 8-9). The district court denied Ricks' motion (Tr. 10).

Counsel for Ricks then moved "for a dismissal of the indictment or suppression of anything in June of 1975 on the grounds that what is given to the court as an alleged overt act is not an overt act at all, but it is a

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[these tapes] becomes such a problem, then you will have to raise it with me in that regard" (Tr. 6), and by allowing defense counsel to recall any Government witness it desired and reexamine that witness with respect to the tapes, GX 2 and 3 (Tr. 86), an offer which defendants availed themselves of (Tr. 372-84).

In view of the Government's satisfactory explanation for the tardy production of these tapes (GX 2 and 3), the failure of defense counsel to specifically request a continuance when presented prior to trial with notice of the existence these recordings and the accommodations made by the district judge with respect to these recorded conversations, it clearly was not error for the Government to play these recordings to the jury, without objection, late in the afternoon of the second day of trial (at the close of its proof) (Tr. 318-19) and the defendants were not unduly prejudiced thereby. See *United States* v. *Pineros*, Dkt. No. 75-1354 slip op. 2855, 2861 (2d Cir., Mar. 29, 1976); *United States* v. *Reed*, 526 F.2d 740, 741 (2d Cir. 1975); *Cf.*, *United States* v. *Cirillo*, 499 F.2d 872, 881-83 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974). See also, *United States* v. *James*, 495 F.2d 434, 436-37 (5th Cir.), *cert. denied*, 419 U.S. 899 (1974).

completed crime by the informer" (Tr. 11).* The court declined to rule on this motion before trial, but implicitly denied it at the close of the Government's case (Tr. 11, 322-23).

Later, during trial, counsel for Ricks moved for a mistrial following the Government's reference to the June 5, 1975 transaction in its opening statement (Court's Ex. 3, A. 52) and counsel also moved to strike the testimony of Miller with regard to the events embracing the June transaction (Tr. 61). The district judge denied each of these motions (Tr. 37, 61).**

Despite the plethora of motions made by defense counsel prior to and during the trial, never once did counsel for either Ricks or Figueroa move for a continuance in face of the proof of this June 5, 1975 transaction. This failure is fatal to the defendants' claims. *See United States* v. *Pineros*, Dkt. No. 75-1354 slip op. 2855, 2861 (2d Cir., Mar. 29, 1976); *United States* v. *Andrews*, 381 F.2d 377, 378 (2d Cir. 1967), *cert. denied*, 390 U.S. 960 (1968). For had counsel been genuinely prejudiced by proof of the June transaction they would surely have moved to briefly delay the trial. Rather than having done so, they instead contend, for the first time on this appeal, that requesting a continuance in the district court would have been a "futility" (Br. of Ricks at 6), the

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* The motion challenging the June, 1975 overt act as not being an overt act, but rather as being a completed sale of cocaine is, of course, sheer nonsense because "[i]t is hornbook law that conspiracy and its underlying substantive offense are separate and distinct and can be charged as such." *United States* v. *Zane*, 495 F.2d 683, 692 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *cf. United States* v. *Feola*, 420 U.S. 671, 693-94 (1975).

** It is to be noted that nowhere in the record did counsel for Figueroa join in any of the motions made by counsel for Ricks.

absence of which is "both understandable and excusable" (Br. of Figueroa at 14).

The failure to move for a continuance may well be "understandable," not, as the defendants would have it, because it would have been "futile" to advance reasonable arguments in support of a brief delay to the District Court, but rather because defense counsel knew that the motion would have lacked any merit. The failure to make this motion is, we submit, indicative of the lack of substance which characterizes defendants' claims, and their contention that the District Judge was deaf to reasoned argument is a mere ruse to obtain review of a point waived below. See *United States* v. *Carroll*, 510 F.2d 507 (2d Cir. 1975). "In other words, any prejudice could perfectly well have been rectified by a recess [or a continuance]. Absent such a request the court cannot be faulted for having denied the request to preclude the Government from alluding to the material in question." *United States* v. *Pineros*, *supra*, slip op. at 2861.

Moreover, assuming *arguendo* that the motions which were made by the defendants could *sub silentio* be viewed as an appropriate request for a continuance, allowing the Government to prove the June transaction was not error. The decision whether to grant a continuance rests within the broad discretion of the trial judge, the sole requirement being that his decision be reasonable. *United States* v. *Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). See also *United States* v. *Maxey*, 498 F.2d 474, 482-84 (2d Cir. 1974); 3 C. Wright, Federal Practice and Procedure—Criminal § 832 at 333 (1969). In the instant case, no abuse of discretion can be found in the actions of the District Court.

Unlike *United States* v. *Baum*, *supra*, where "the prosecution had refused to reveal the identity of a government witness, whose testimony was crucial both to

the prosecution and to the defense, [until] the witness took the stand," *United States* v. *Miranda*, 526 F.2d 1319, 1330 (2d Cir. 1975), thereby depriving the defense of "a fair opportunity to meet the critical and damaging proof on an offense not presented against him in the indictment," *United States* v. *Baum*, *supra*, 482 F.2d at 1332,* and unlike *United States* v. *Kelly*, *supra*, where the Government withheld the results of certain laboratory tests for several months, revealing them only during trial, thereby prompting this Court to hold that "[t]he course of the government smacks too much of a trial by ambush" 420 F.2d at 29, the factual framework wherein the June, 1975 cocaine transaction was revealed to the defense neither served to deprive defense counsel of fair notice nor smacked of an ambush. Cf., *United States* v. *Bermudez*, *supra*. Indeed, rather than falling within the perimeters of *Baum* and *Kelly*, as defendants suggest, the notice provided by the Government with regard to the June, 1975 cocaine transaction and the admission of this evidence by the District Court comes squarely under the approval of such cases as *United States* v. *Cotroni*, Dkt. No. 75-1118, slip op. 6569, 6576 (2d Cir., Dec. 22, 1975); *United States* v. *Carroll*, *supra*; *United States* v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *cf.*, *United States* v. *Pineros*, *supra*; *United States* v. *Reed*, 526 F.2d 740 (2d Cir. 1975); *United States* v. *Johnson*, 525 F.2d 999, 1004 n.4 (2d Cir. 1975); *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975).

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* In addition to distinguishing *Baum* in *United States* v. *Miranda*, *supra*, this Court has further pointed up the differences between that case and the instant one in such decisions as *United States* v. *Leonard*, *supra* and *United States* v. *Johnson*, *supra*. In *Leonard*, this Court affirmed the trial court's denial of a continuance where "Leonard's counsel was on notice as to [the questioned] evidence and had obtained discovery [of applicable items] *six days* before they were put into evidence." 524 F.2d at 1092 (emphasis added).

In *United States* v. *Salazar*, *supra*, for example, the defendant was found guilty by a jury, after a four day trial, of participating in a conspiracy to import and distribute large quantities of heroin. Salazar appealed urging prejudicial error in the conduct of his trial in that he was denied a reasonable opportunity to prepare his defense, because the trial court had denied his request for a continuance after the Government filed its complete bill of particulars only four days prior to trial. Salazar maintained "that this four day period before trial was insufficient to 'investigate' thoroughly the more than eighty 'contacts' reported in the government particulars." 485 F.2d at 1277. Notwithstanding these lengthy particulars which appear far more complex than the one cocaine transaction here at issue, this Court held that there was no reversible error, stating:

> "[T]he record does not show, and appellant has failed to establish, that the information contained in the particulars could not have been adequately reviewed in the four days before trial, or, in fact, that this information was vital to the defense that Salazar made. . . . We are not persuaded that the period between the delivery of these bills of particulars and the trial was not ample for appellant to consider the information provided and to obtain from it a clear picture of the essential facts of the crime charged and the broad outlines of the government's case." *Id.* at 1278.*

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* The Court went on to completely negate the argument made by Ricks at pages 8-9 of his brief, wherein he argues "that there is no significant difference between a situation where newly appointed counsel is forced to trial in only 1½ days after appointment" and the situation presented herein. The Court, in *Salazar*, found such an argument to be "inapposite" because such cases "involve the markedly different situation in which defendants were compelled to go to trial without counsel or first obtained counsel only minutes, hours, or several days before trial." 485 F.2d at 1278 n.11.

In the instant case, while mouthing the words of prejudice, neither Ricks nor Figueroa have made any showing that the information concerning the June, 1975 transaction was not and could not have been adequately reviewed prior to trial.

Similarly, in *United States* v. *Carroll*, *supra*, the defendants complained of the introduction of evidence of prior criminal conduct which, like the June cocaine sale in the present case, was "part and parcel" of the conspiracy charged. The Court, after first holding that the admission of this evidence was proper, *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967), and that there "is no general requirement that the government disclose in a bill of particulars all the overt acts it will prove in establishing a conspiracy charge," 510 F.2d at 509, went on to conclude that "non-disclosure of prior criminal conduct provides no basis for disturbing the convictions. No specific request was made to elicit such information, nor was a continuance sought to meet such evidence when it was introduced." *Id.* at 509. The same is true with respect to the convictions at bar, with one important exception. In the present case, the defendants had notice of Government's intent to introduce proof of June, 1975 transaction for almost a week prior to trial.*

Lastly, even if the conduct of the trial court were found by this Court to constitute error, a reversal of these convictions would only be warranted if, as a result of this error, the rights of the accused were substantially prejudiced. See, *e.g.*, *United States* v. *Salazar*, *supra*,

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* In addition to the decisions of this circuit, see also *United States* v. *Wixom*, Dkt. No. 75-1718, slip op. at 5 (8th Cir., Jan. 22, 1976); *United States* v. *Miller*, 520 F.2d 1208, 1211 (9th Cir. 1975); *United States* v. *Anderson*, 509 F.2d 312, 322-25 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975); *United States* v. *James*, *supra*.

485 F.2d at 1278; *United States* v. *Knohl*, 379 F.2d 427, 439 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967). Here no demonstratable showing of even the slightest prejudice to the defendants can be made.

First, counsel for both defendants had adequate time after they first received notice of the June, 1975 transaction to prepare to meet this evidence and nothing concrete has been advanced to indicate their inability to do so. Although counsel now suggests that had more time been available to them, they would have further investigated the June transaction and interviewed people like Robinson and, perhaps, Miller's girlfriend Diane, never once, either prior to or during trial, did counsel for these defendants indicate to either the District Court or the prosecutor a desire to speak with either of these individuals, both of whom were available. *Cf. United States* v. *Miranda*, *supra*. Second, at least as to Ricks, the proof, independent of the June, 1975 transaction, was so overwhelming, that, except for counsel's continued use of the phrase "highly prejudicial" (see, *e.g.*, Tr. 41, 152), no prejudice, much less substantial prejudice, arising from proof of the June, 1975 cocaine sale, has been or could be shown. Finally, as to Figueroa, counsel has correctly observed that the Government's case hinged in large part upon the credibility of Mrs. Durr. While counsel now suggests that had more time been available for preparation, Mrs. Durr's credibility could have been further placed in issue, it is apparent, from even a cursory reading of the trial record (Tr. 196-244), that she was subjected to substantial cross-examination, both with regard to the June, 1975 sale and the other transaction. Such ample and adequate cross-examination of Durr, when coupled with Figueroa's flat denials of participation, fairly presented the principal issue in this case to the jury. *Cf. United States* v. *Salazar*, *supra*.

POINT II

The Government's Introduction of Durr's Prior Consistent Statement was Entirely Proper.

Figueroa, in apparent disregard of both Rule 801(d)(1)(B) of the Federal Rules of Evidence and the antecedent case law of this circuit, argues that the admission into evidence, through the testimony of Special Agent Michael Levine, of certain prior consistent statements made by Jewelean Durr on the night of her arrest constituted reversible error. Apart from the failure of defense counsel to properly object to the admission of this evidence or to seek a limiting instruction, which would alone require affirmance by this Court, defendant's contention is without merit.

At trial, Special Agent Levine testified with regard to the prior statements of Mrs. Durr as follows:

> "I asked Miss Durr if she knew who the third individual was that was arrested with her and Herbert Ricks. She said that was Willie.
>
> I asked her where the cocaine we had seized in the hotel room came from, and she said that it came from Willie.
>
> I asked her if she had any other transactions where Willie was involved, and she said that she had taken part in a prior narcotic transaction, wherein Herbert Ricks had received cocaine from Willie.
>
> One that she could remember occurred when she delivered cocaine to an individual named John Miller at a Westchester hotel or motel" (Tr. 252-53).

This testimony was offered by the Government only after Mrs. Durr had been cross-examined in detail concerning

(1) the written statement which she gave to a different agent of the Drug Enforcement Administration following her discussions with Mr. Levine on the night of her arrest (GX 3504), which made little mention of Figueroa (Tr. 208, 211, 231-33), (2) her cooperation with the Government in this matter and the discussions had between herself and the Assistant United States Attorney (Tr. 224-28), and (3) the nature of her agreement with the Government and her hopes for favorable consideration as the result of her trial testimony (Tr. 228). In sum, on cross-examination, defense counsel attempted to color Mrs. Durr's trial testimony, especially as to Figueroa, as a series of recent falsifications designed to obtain favorable treatment from the Government. In such circumstances, the introduction of Durr's prior statement to Agent Levine was entirely proper.

Rule 801(d)(1)(B) provides that "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement and the statement is . . . consistent with his testimony and is offered to rebut an *express or implied* charge against him of recent fabrication or improper influence or motive . . ." (emphasis added).* The testimony given by Agent Levine squarely fits within the scope of this Rule because "[e]vidence which counteracts a suggestion that the witness changed his story in re-

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* The Advisory Committee speaks of Rule 801(d)(1)(B) in the following terms:

> "Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

sponse to some threat or scheme or bribe [or promise] by showing that his story was the same prior to the external pressure is highly relevant in shedding light on the witness' credibility." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801 d)(1)(B)[01] at 801-100 (1975).

In determining whether the proffered consistent statement rebuts the express or implied charge of recent fabrication or improper influence or motive, one must "look to previous case law." 4 J. Weinstein & M. Berger, *supra*. In this circuit, the mere *implication* by defense counsel that a witness may have a motive to fabricate is sufficient to permit introduction of a prior consistent statement which antedates the motive. *United States* v. *Zito*, 467 F.2d 1401 (2d Cir. 1972). In *Zito*, as in the instant case, "the defense at least suggested to the jury that [the prosecution's principal witness] hoped for clemency for himself and that his trial testimony was a fabrication, as a reward for which he hoped to go unwhipped of justice." *Id.* at 1404. See also *United States* v. *Dorfman*, 470 F.2d 246, 248 (2d Cir. 1972), *cert. denied*, 411 U.S. 923 (1973); *United States* v. *Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States* v. *DeLaMotte*, 434 F.2d 289 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971);* *United States* v. *DiLorenzo*, 429 F.2d 216

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* In the context of the instant case, one decision of this Court stands so firmly in support of allowing the Levine testimony into evidence that it deserves special note. *United States* v. *DeLaMotte*, *supra*. In *DeLaMotte*, a kidnapping and Dyer Act case, "[t]he only evidence implicating appellant was that of Jackson who appeared as a witness for the government after having been convicted in a jury trial of the same crimes and sentenced to [at least 25 years in jail]." 434 F.2d at 291. There, it was appellant's contention "that it was prejudicial error to permit Agent Conley of the F.B.I. to testify as to the statement

[Footnote continued on following page]

(2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971); *United States* v. *Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957); *DiCarlo* v. *United States*, 6 F.2d 364, 366 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). Moreover, not only does the trial court have broad discretion in determining whether or not the defense has implied a motive for fabricated or contrived trial testimony, *United States* v. *Zito*, *supra*, 467 F.2d at 1404, but the jury must be given every opportunity to consider prior consistent statements whenever it is "reasonably possible" that the prior consistent statement was made before the motive to fabricate or contrive arose. See *DiCarlo* v. *United States*, *supra*; *United States* v. *Grunewald*, *supra*; *United States* v. *DiLorenzo*, *supra*.* Applying these standards to the facts at bar, it is readily apparent that Durr's prior consistent statement, presented to the jury through Levine's testimony, was properly admitted into evidence.

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given him by Jackson shortly after his arrest . . . ." *Id.* at 293. The trial court allowed this statement into evidence on the theory that once Jackson's motives (to obtain bail pending appeal and reduction of sentence) had been called into question on cross-examination, the Government was permitted to rehabilitate him by showing Jackson's prior consistent statements preceded the time that his alleged motives for falsification arose. *Id.* This Court affirmed the district court's admission of Agent Conley's testimony as to the prior consistent statements by Jackson and, in so doing, rejected the *Bruton* arguments made by Figueroa (Br. of Figueroa at 18) out of hand: "nothing . . . prevented appellant's counsel from cross-examining Jackson on these points, so this claim has no basis." *Id.* at 293-94.

* In this regard, it is well established that if there are several motives for falsifying ascribed to a witness, and it is reasonably possible for the jury to find that a proffered prior consistent statement antedated *at least one of these motives*, the Court should not exclude the statement. *United States* v. *Grunewald*, *supra*; *United States* v. *Fayette*, 388 F.2d 728, 736 (2d Cir. 1968).

Figueroa further contends, however, that even if properly admissible as a prior consistent statement, it was error for the district court not to instruct the jury as to the limited purpose for which it was allowed, *i.e.*, to bolster the testimony of Durr. As the Advisory Committee Note points out, "under the rule [prior consistent statements] *are substantive evidence.* The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission into evidence, no sound reason is apparent why it should not be *received generally*" (emphasis added). All that Rule 801(d)(1)(B) requires is that the declarant testify at trial and be subject to cross-examination, as Mrs. Durr here was, both prior to and after (Tr. 380-83) Levine testified with respect to her prior statement. See *United States* v. *Blitz*, Dkt. No. 75-1237, slip op. 2761, 2794 (2d Cir., Mar. 25, 1976).

While the foregoing, Rule 801(d)(1)(B), is somewhat inconsistent with the prior law of this Circuit with regard to the need for limiting instructions in circumstances such as those at bar, see *United States* v. *Zeehandelaar*, 498 F.2d 352, 357 (2d Cir. 1974); *United States* v. *Lipton*, *supra*, *United States* v. *DiLorenzo*, *supra*, the defendant's present claim nonetheless lacks merit. Figueroa neither objected to the admission of this consistent statement testimony nor requested a limiting instruction from the District Court. In such circumstances, the following passage from *United States* v. *Lipton*, *supra*, wherein the Court approved of a decision by the District Court which permitted an IRS agent (Ruggiero) to testify to a prior consistent statement made by another Government witness (Williams), applies with equal force to this case:

> "At the outset, we note that Lipton did not object at trial to the admission of Ruggiero's testimony as hearsay, indeed, he conceded that it was admissible as a prior consistent statement by Wil-

liams. It is true that Lipton's trial counsel did interpose a general objection to the admission of Ruggiero's conversation with Williams, which objection was promptly overruled; but of course this was insufficient to preserve for appeal the presently asserted hearsay claim. Moreover, Lipton did not request the instructions which he now claims should have been given; nor did he object to the judge's charge of the subject. Under these circumstances, the short answer to Lipton's claim is that he is precluded from raising it for the first time on appeal, since it was not plain error. United States v. Indiviglio, 352 F.2d 276, 279-80 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966), and many other cases to the same effect." 467 at 1167-68.

POINT III

The Trial Court Did Not Improperly Restrict Ricks' Right of Cross-Examination.

Ricks contends that the rulings of the trial court "unreasonably and improperly restricted counsel in his attempt to cross-examine the government's main witnesses," thereby resulting "in a deprivation of due process" (Br. of Ricks at 15). Specifically, counsel points to three instances where "improper" restraints were imposed: (1) the cross-examination of Miller about the specifics of a criminal complaint pending against him; (2) the cross-examination of Durr as to matters already gone over by counsel for Figueroa; and (3) the cross-examination of Durr with regard to certain 3500 exhibits and related matters. Recognizing that the "extent of cross-examination of a witness is normally resolved by the trial judge in the reasoned exercise of his discretion,"

United States v. *Finkelstein*, Dkt. No. 75-1154, slip op. 862 (2d Cir., Dec. 1, 1975); see *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir. 1975); *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3471 (Feb. 24, 1976); *United States* v. *Turcotte*, 515 F.2d 145, 151 (2d Cir. 1975); *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975), we turn to examine each of the errors alleged by the defendant.

The first claim of error concerns the trial judge's refusal to permit Ricks' counsel to inquire of Miller concerning the specifics of a pending narcotics conspiracy complaint which had been filed against him in the Southern District of New York (GX 3502, A. 54-57). This document was furnished to defense counsel prior to the start of the trial, and, during the cross-examination of Miller, counsel for Ricks stated his intent "to go into and cross-examine as to every allegation in that document [GX 3502]" (Tr. 100). After learning from the Government the circumstances giving rise to this charge (Tr. 101), Judge Carter ruled that he was "not going to allow you [counsel for Ricks] to go into detail on that. You can ask him what charges are pending against him and get his answer, but you are not going into that" (Tr. 102).

The trial judge's ruling was entirely correct because, as this Court has recently stated:

> "While there is authority permitting examination into the 'nature' of the crime . . . the scholarly treatises on which those cases rest indicate that by 'nature' is meant only the generic type of criminal behavior and *not* [*its*] *particular details.* [Citation Omitted] The generic type of criminal behavior having been elicited, the trial judge's restriction of further cross-examination . . . was

not an abuse of discretion." *United States* v. *Finkelstein, supra.**

See also *United States* v. *Tomaiolo*, 249 F.2d 683, 687 (2d Cir. 1957); 2 C. Wright, *supra*, § 416 at 193 (1969 and Supp. 1975), and other cases there cited.

Ricks next complains that "the court improperly and severely limited counsel's right to properly cross-examine Miss Durr" (Br. of Ricks at 14), by indicating to counsel at the outset of his cross-examination "that I am not going to allow you to go over ground that Mr. Gross [counsel for Figueroa] has gone over. You may, if you want to, explore further in the area, but you are not going over the same ground" (Tr. 229). This ruling by the trial judge was proper and is in accord both with the applicable precedent and sound judgment. See Fed. R. Evid. 403, 611; *United States* v. *Pacelli*, 491 F.2d 1108, 1120 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *DeMarco*, 488 F.2d 828, 831 n.8 (2d Cir. 1973); *United States* v. *Wesson*, 478 F.2d 1180, 1182 (7th Cir. 1973); *cf. Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

The last challenge advanced by Ricks is directed toward limitations allegedly placed by the trial court on his examination of Durr with regard to her plea minutes (GX 3508), her statement to the Drug Enforcement Administration at the time of her arrest (GX 3504), and her affidavit in support of a motion to suppress that statement (GX 3507). As the trial record reveals (Tr. 231-39), these restrictions, if there were any at all, arose, not from what Ricks portrays as "the court religiously protecting the witness from the perfectly proper attack"

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* Both the generic nature of the charge against Miller and other matters relating to this charge were amply placed before the jury during trial (See Tr. 83, 94-95, 121, 124-25).

(Br. of Ricks at 14), but rather from counsel's failure to comply with such fundamental evidentiary principals as laying a proper foundation for the use of prior inconsistent statements, pinpointing the alleged inconsistency by showing the statement to the witness, establishing a basis for his questions before proceeding, and the like, to which points the Government's objections were made and sustained.* As this Court has said, "[a]n improper

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* The impropriety of the questions asked of Durr by trial counsel for Ricks is amply demonstrated by setting out the following typical colloquy:

"Q. Miss Durr, I show you a statement previously marked as Exhibit [3504]. . . .

Q. I ask you to read to the Court this paragraph aloud and clear.

Mr. Kaplan: Objection, your Honor.

The Court: The objection is sustained. She does not have to read anything. You ask her to read it and ask her a question about it.

Mr. Katz: All right.

Q. Will you read this paragraph—

The Court: To yourself.

Mr. Kaplan: What paragraph is Mr. Katz referring to?

Mr. Katz: I am referring to the paragraph—it starts off——

The Court: Keep your voice down, Mr. Katz.

Mr. Katz: "We then arrived at the Skyline Motor Inn".

Mr. Kaplan: That's sufficient.

The Court: Have you sufficiently read it?

The Witness: Yes.

Q. Have you digested it? Will you tell the Court what if anything in that paragraph is untrue?

The Court: Without an objection, that question is——

Mr. Katz: All right.

The Court: Withdrawn.

Q. By the way, is this paragraph true? Did you initial it, and is it true? A. No.

Q. Now will you tell the Court in what respect that paragraph is untrue?

The Court: I don't see any point to that. If your purpose is to show that it is inconsistent with something

[Footnote continued on following page]

she has indicated here, then focus a question and bring it out.

Q. Have you testified here to the fact that Herbie took——

The Court: Well, no just ask her a question about it.

Q. Does this paragraph read to the effect that Herbie took two plastics bags from his pants? Yes or no, Miss Durr? A. No.

Q. That is not a true statement, is it? A. No.

Q. Did you ever make that statement again after you signed that statement? A. No.

Q. I show you your plea, marked 3508, and I ask you to read page 8, this plea being taken before Judge Carter on November 19th.

. . .

Mr [illegible] Page 8, line 3 to line 6, your Honor.

Q. [illegible] I ask you, Miss Durr, have you had sufficient time to read and digest the statement?

Mr. Katz: Will the Court now allow me to have her read the statement?

The Court: No, I am not going to allow you to have her read the statement because it is very clear to me that there is nothing in that statement that inconsistent with Miss Durr's testimony here.

Mr. Katz: Your Honor, I make the following offer of——

The Court: The point is that I have now ruled and please do not argue with me. She does not have to answer that question. There is no inconsistency. Now, you have your exception and move on, please.

Q. Is it true that you continuously lied about whether or not you carried that into the room in your handbag? A. No.

Q. You have never said that Herbie had it in his pants, is that what you want us to believe? A. On what occasion?

Q. Miss Durr, you have made so many statement[s] that I can't help you on that score.

The Court: Mr. Katz——

Mr. Katz: Yes.

The Court: You are not testifying, you know. If you

[Footnote continued on following page]

want to testify, we will swear you in and put you on the witness stand. Your purpose is to ask questions, not to make statements.

Q. All right, Miss Durr, you tell us, when did you lie about the cocaine being in Herbie's pants and when did you tell the truth about it being in your bag?

The Court: That is not a proper question. You brought out the fact she made a statement it was in her bag which is inconsistent with her statement here. Now, let's go on.

. . . .

Q. On the night of September 22, 1975, about what time did you and the DEA agents leave the premises of 246?

Q. Do you remember what time you were advised of your rights that night?

Mr. Kaplan: Objection, your Honor.

The Court: Sustained.

Q. Were you advised of your rights that night?

Mr. Kaplan: Objection.

The Court: Sustained.

Q. Did you sign any document relative to making a statement that night? A. Yes.

Q. Is this a fair and accurate copy of that statement? I ask the government to produce the original.

Mr. Kaplan: Is what a fair and accurate statement?

Mr. Katz: It's marked as Exhibit 3503.

Mr. Kaplan: Your Honor, I object to this as irrelevant.

The Court: Let me see it.

(Handed).

Mr. Katz: I am laying the foundation for something, your Honor. If you want an offer of proof, I will make it.

The Court: Objection is sustained.

Q. Did you sign the statement that I showed you as 3504——

Mr. Kaplan: Objection, your Honor.

The Court: Sustained.

Q. —willingly?

The Court: The objection is sustained.

Q. When you gave the statement marked as 3504, which is the statement we previously showed you, did you do so of your own free will?

Mr. Kaplan: Objection.

The Court: Sustained.

[Footnote continued on following page]

Mr. Katz: Your Honor, I have an offer of proof.

The Court: Sustained, sustained.

. . . .

Q. Do you remember signing a paper on the 30th day of October, 1975 for Mr. Michelman?

Who is Mr. Michelman?

A. My attorney.

Q. I show you 3507. Will you please read it and examine it?

The Court: Let me see that, please.

(Handed).

The Court: I think I have——

Mr. Katz: May we have that marked in evidence, please?

The Court: I think I have already sustained an objection to that, and I gather there will be an objection since it is merely a continuation of the question I have ruled out of order.

Mr. Kaplan: That's correct.

The Court: The objection is sustained, Mr. Katz and do not persist.

Mr. Katz: Your Honor, may I understand this——

The Court: The objection is sustained.

Mr. Katz: You are not going to let me used a sworn affidavit before this Court?" (Tr. 231-39).

As these passages clearly show, counsel never once asked a proper question, indeed, proceeding to the point where counsel himself began to testify. Counsel's shotgun attack, his attempts to have the witness read matters not in evidence to the jury, his failure to exhaust Mrs. Durr's memory before thrusting documents upon her, his propounding of double-pronged questions and his attempts to offer entire documents, rather than single inconsistencies, into evidence all contributed to the self-imposed failure of his cross-examination. While the trial court did erroneously fail to recognize certain inconsistencies between Durr's direct testimony and certain 3500 exhibits, this error is obviated by counsel's failure to attempt to correct the record, as well as by Judge Carter's statement to the jury that certain inconsistencies had been shown (Tr. 236). Thus, the following words of Eighth Circuit in *Skogen* v. *Dow Chemical Co.*, *supra*, 375 F.2d 692, 704 (8th Cir. 1967), are wholly apt:

"In their brief, plaintiffs have pointed to many individual instances in which they believe their cross-examination

[Footnote continued on following page]

question is not made proper by virtue of being asked on cross-examination". *United States* v. *Torres*, 503 F.2d 1120, 1125 (2d Cir. 1974). See also *Skogen* v. *Dow Chemical Co.*, 375 F.2d 692, 704 (8th Cir. 1967).

In addition, Durr was otherwise subjected to full and thorough cross-examination in which her veracity and the motives for her testimony were clearly put in issue. Thus, as this Court stated in *United States* v. *Turcotte*, *supra*, 515 F.2d at 151: "If the jury is otherwise in possession of sufficient information concerning the witness' possible motives for testifying falsely in favor of the government, there is no abuse of discretion if a judge restricts the cross-examination of a government witness." *Cf. United States* v. *Coughlin*, 514 F.2d 904, 908 (2d Cir. 1975).

Moreover, with regard to any one or all of the foregoing points raised by Ricks, while the Government recognizes that the right of cross-examination "is implicit in the constitutional right of confrontation," *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973), once the overwhelming nature of the proof submitted against Ricks is analyzed, it can only be concluded that, if any error arose from the trial judge's rulings, it was harmless beyond a reasonable doubt. See Fed. R. Crim. P. 52(a); *Scheneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington*

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of witnesses was improperly limited by the Court. Without going into burdensome detail, we have examined the questions, the context in which they were asked, and the applicable objections, and we concluded that there was no abuse of the trial court's broad discretion. Plaintiffs were not deprived of their right of cross-examination. The questions asked were often argumentative, misleading, or assumed facts not in evidence. Such questions are, indeed, objectionable, and the trial court was entirely proper in sustaining the objections."

v. *California*, 395 U.S. 250 (1969); *United States* v. *Duhart*, 511 F.2d 7, 9-10 (6th Cir. 1975); *United States* v. *Sidman*, 470 F.2d 1158, 1165 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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